STATE OF MICHIGAN

IN THE SUPREME COURT

BETTY SORKOWITZ, Individually and as Trustee for the MORRIS AND SARAH FRIEDMAN IRREVOCABLE TRUST, Betty Sorkowitz, Trustee for the SARAH FRIEDMAN TRUST, Betty Sorkowitz, Personal Representative for the ESTATE OF SARAH FRIEDMAN, BETMAR CHARITABLE FOUNDATION, INC., JULIE SHIFFMAN, JANET JACOBS, CAROLYN JACOBS, RENEE JACOBS, JODIE SHIFFMAN, and JEFFREY SHIFFMAN,

Plaintiffs-Respondents,

v

LAKRITZ, WISSBRUN & ASSOCIATES, P.C., a Michigan corporation, GERALD LAKRITZ and KENNETH WISSBRUN, joint and several,

Defendants-Petitioners.

_____/

Supreme Court No. 126562

Court of Appeals No. 242016

Lower Court Case No. 01-037192-NC

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BRIEF OF *AMICUS CURIAE* STATE BAR OF MICHIGAN'S PROBATE AND ESTATE PLANNING SECTION IN SUPPORT OF DEFENDANTS-PETITIONERS LAKRITZ, WISSBRUN & ASSOCIATES, P.C., GERALD LAKRITZ, AND KENNETH WISSBRUN

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The
COUNCIL OF THE STATE BAR OF MICHIGAN'S
PROBATE AND ESTATE PLANNING SECTION
respectfully submits the following position on:

*

Sorkowitz et al. v Lakritz, Wissbrun & Associates, P.C. et al.

*

The Probate and Estate Planning Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Council of the Probate and Estate Planning Section only and is not the position of the State Bar of Michigan. To date, the State Bar of Michigan does not have a position on this matter.

The total membership for the Probate and Estate Planning Section is 5063.

The position was adopted by a unanimous vote of the Council of the Probate and Estate Planning Section after discussion at a Council meeting on June 18, 2005, held in conformance with the Section's bylaws. The number of members in the decision-making body is 23.

Report on Public Policy Position

Name of Section:
Probate and Estate Planning Section

Contact Person:
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Other:
amicus curiae brief in the Matter of Sorkowitz et al. v Lakritz, Wissbrun & Associates, P.C. et al.

Date position was adopted:
June 18, 2005

Process used to take the ideological position:
Discussion at Council meeting on June 18, 2005

Number of members in the decision-making body:
23

Number who voted in favor and opposed to the position:
16 in favor
0 opposed

7 members absent

FOR SECTIONS ONLY:

- ✓ This subject matter of this position is within the jurisdiction of the section.
- ✓ The position was adopted in accordance with the Section's bylaws.
- ✓ The requirements of SBM Bylaw Article VIII have been satisfied.

If the boxes above are checked, SBM will notify the Section when this notice is received, at which time the Section may advocate the position.

Position:
The Council respectfully requests that the Court reaffirm that, in the absence of an ambiguity or inconsistency, only the "four corners" of an estate document may be considered when attempting to ascertain a testator's or donor's intent, and it is improper to look to an expert opinion regarding "usual" estate planning practices as a proxy for that intent.

There is no specific legislation, court rule, or administrative regulation that is the subject of or referenced in this report.

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BASIS OF JURISDICTION

This Court has jurisdiction over this matter pursuant to MCR 7.301(a)(2) and the Court's Order of December 27, 2004, granting Defendants-Petitioners' Application for Leave to Appeal. *Sorkowitz v Lakritz, Wissbrun & Assocs, PC*, 472 Mich 898; 696 NW2d 708 (2005). Defendants appeal from an Opinion of the Michigan Court of Appeals dated April 27, 2004. *Sorkowitz v Lakritz, Wissbrun & Assocs, PC*, 261 Mich App 642; 683 NW2d 210 (2004).

STATEMENT OF RELIEF SOUGHT

The Council of the State Bar of Michigan's Probate and Estate Planning Section (the "Council") files this *amicus* brief and respectfully requests that the Court reaffirm that, in the absence of an ambiguity or inconsistency, only the "four corners" of an estate document may be considered when attempting to ascertain a testator's or donor's intent, and it is improper to look to an expert opinion regarding "usual" estate planning practices as a proxy for that intent.

QUESTION PRESENTED FOR REVIEW

1. **Whether a court should rely on expert testimony regarding "usual" estate planning practices as a proxy for a testator's or donor's actual intent as expressed in the plain language of the estate planning documents.**

The trial court answered: No.

The Court of Appeals answered: Yes.

The Probate and Estate Planning Council answers: No.

Authority: *Mieras v DeBona*, 452 Mich 278, 307-308; 550 NW2d 202 (1996) (holding that it is neither proper nor necessary to speculate regarding "usual" estate planning practices when ascertaining a testator's intent that is expressed in estate planning documents).

STATEMENT OF FACTS AND PROCEEDINGS

The facts most pertinent to the issues presented in this *amicus* brief are summarized as follows:

The Nature of the Dispute

Defendants drafted a number of estate planning documents for Morris and Sarah Friedman, including an irrevocable trust dated July 20, 1988 (the "Morris and Sarah Friedman Irrevocable Trust" or simply the "Irrevocable Trust"). (First Am Compl ¶ 4; Lansky Aff ¶ 2(F).) Plaintiffs' principal claim is that Defendants left out of the estate plan a so-called "Crummey clause" allowing for tax savings. (Br in Resp to Application for Leave at 3.)

The Crummey power arises out of a provision in the Internal Revenue Code that provides for an annual exclusion from the federal gift tax. *See generally* 26 USC 2503(b). In *Crummey v Commissioner of Internal Revenue*, 397 F2d 82 (CA 9, 1968), the United States Court of Appeals for the Ninth Circuit held that gifts to a trust would qualify as a present interest for purposes of the annual exclusion under section 2503(b)—thus preserving the donor's unified credit amount, available at the donor's death—if the trust allowed the beneficiaries to withdraw an amount equal to the annual gift tax exclusion immediately following a transfer of assets to the trust. Thus, in exchange for granting a beneficiary a limited right to immediate withdrawal, a trust grantor could generate future tax savings for the estate. At the time Defendants drafted the Morris and Sarah Friedman Irrevocable Trust, an individual could give up to $10,000 per person, per year, without subjecting the gift to a gift tax. The exclusion is now $11,000 per person, per year.

On its face, the Morris and Sarah Friedman Irrevocable Trust does not contain a Crummey clause, nor does it contain any language purporting to have the effect of a Crummey

clause. To the contrary, the Irrevocable Trust requires that there be no distribution to any great-grandchild from income or principal until that child reaches the age of 18. (Application for Leave at 3 n 9 (quoting from Section III of the Trust).) Based solely on the Irrevocable Trust document itself, then, there is no evidence that Morris and Sarah Friedman intended to include a Crummey clause.

Plaintiffs submitted an expert affidavit in the trial court that implies Morris and Sarah Friedman intended not to incur "unnecessary or excessive gift, estate or generation skipping taxes," based on their stated intention, in the Irrevocable Trust, to "provide for the secure future" of their great-grandchildren. (Lansky Aff ¶ 9.) The Court of Appeals assumed that every individual intends to minimize taxes when engaged in estate planning;[1] however, the generic boilerplate language that the Affidavit quotes does not indicate whether the Friedmans were willing to grant their beneficiaries immediate withdrawal rights in exchange for tax savings. Rather, the Irrevocable Trust and other estate documents are silent on this issue.

The Trial Court Opinion

The trial court granted summary disposition under MCR 2.116(C)(8) in its Opinion and Order dated May 24, 2002. Relying on *Mieras v DeBona*, 452 Mich 278; 550 NW2d 202 (1996), and *Bullis v Downes*, 240 Mich App 462; 612 NW2d 435 (2000), the trial court held that third-party beneficiaries are permitted to bring a malpractice action only where "the decedent's intent as expressed in the overall estate plan has been frustrated by the attorney who drew up that plan." (Trial Ct Op at 3.) Moreover, the plaintiffs must be able to prove the decedent's intent without resort to extrinsic evidence. (*Id.* at 3.) Concluding that Plaintiffs could

[1] *Sorkowitz*, 261 Mich App at 651; 683 NW2d 210 ("In this day and age, clients go to estate planning experts not only to have valid testamentary documents prepared, but also to have an estate plan that will minimize the taxes payable recommended . . . .").

not make such a showing here, the trial court held that summary disposition on the pleadings was appropriate. (*Id.* at 4.)

The Court of Appeals Opinion

The Court of Appeals panel reversed. The two member majority attempted to distinguish this Court's "four corners" approach in *Mieras*, characterizing that dispute as one "between beneficiaries where the alternative claims concerning the decedent's intent were both plausible." 261 Mich App at 648; 683 NW2d 210. In contrast, the two panel members contended, "[t]he claim here does not involve competing contentions of beneficiaries or the choice between alternative estate planning approaches, but, rather, the claim . . . that defendants were negligent in their tax planning advice, and failed to include provisions that are so standard in the type of trust here before the Court that the failure to include them demands an explanation." *Id.*; 683 NW2d 210.

Thus, the two panel members agreed "that if the 'four corners' limitation enunciated in *Mieras* controlled here, the circuit court's dismissal of the beneficiaries' claims would have been proper. *Id.* at 647; 683 NW2d 210. But they rejected the *Mieras* "four corners" approach because the interests of the beneficiaries and deceased were purportedly "on the same side":

> The "four corners" rule is applicable in a dispute between potential beneficiaries concerning the intended distribution of the pot of assets or pie left by the decedent. It is not applicable to a claim such as this one, that seeks recovery for diminution in the pot or pie left by the decedents alleged to have been caused by the negligence of the defendants who provided estate planning. Here the interests of the deceased clients, the estate, and all the beneficiaries are aligned on the same side . . . .

Id. at 653; 683 NW2d 210 (emphasis added). The majority so held even though it acknowledged "there may be valid reasons for the omission of a Crummey clause." *Id.* at 651; 683 NW2d 210.

Judge Fitzgerald respectfully dissented, relying extensively on this Court's holding in *Mieras*. As Judge Fitzgerald explained, the duty that an estate planning attorney owes to third-party beneficiaries "is limited 'and only requires the attorney to draft a will that properly effectuates the distribution scheme set forth by the testator in the will.'" 261 Mich App at 655; 683 NW2d 210 (quoting *Mieras*, 452 Mich at 302; 550 NW2d 202). And a "disappointed beneficiary cannot 'use extrinsic evidence to prove that the testator's intent is other than that set forth in the will.'" *Id.*; 683 NW2d 210 (quoting *Mieras*, 452 Mich at 303; 550 NW2d 202).

The problem with Plaintiffs' claims, according to Judge Fitzgerald, was that the only proffered evidence of the decedents' intent was an expert affidavit that did not even purport to discern that intent:

> Rather than provide the estate-planning documents and demonstrate some conflict or inconsistency among them or some ambiguity within them, plaintiffs provided excerpts that shed no light on the issue and an affidavit from an expert who purported to interpret the documents. The interpretation of the estate-planning documents is a question of law for the Court to decide, and an expert cannot testify regarding questions of law or legal conclusion. Because plaintiffs failed to show that the estate-planning documents did not comport with the decedents' intent as expressed within those documents, the trial court did not err in granting defendants' motion as to the various beneficiaries.

261 Mich App at 656; 683 NW2d 210 (emphasis added). Defendants now appeal.

STANDARD OF REVIEW

This Court reviews the grant or denial of summary disposition *de novo*. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

ARGUMENT

I. THIS COURT'S HOLDING IN *MIERAS* CANNOT BE RECONCILED WITH THE COURT OF APPEALS' OPINION BELOW, WHICH IMPROPERLY SUBSTITUTED AN EXPERT OPINION REGARDING "USUAL" ESTATE PLANNING PRACTICES AS A PROXY FOR THE ACTUAL INTENT OF THE DECEDENTS AS EXPRESSED IN THEIR ESTATE DOCUMENTS.

A court's duty when interpreting estate documents is to ascertain and give effect to the intent of the testator or donor expressed in the plain language of the documents. *In re Estate of Butterfield*, 405 Mich 702, 711; 275 NW2d 262 (1979) ("The primary duty of any court faced with the task of resolving a disputed testamentary disposition is to effectuate as nearly as possible the intention of the testator. Where there is no ambiguity, that intention is to be gleaned from the four corners of the instrument, and the court has merely to interpret and enforce the language employed."). The majority opinion below fell far short of applying this standard.

The majority first disregarded the decedents' actual intent as set forth in the estate documents: "We would be ignoring reality to dismiss legal malpractice cases such as this one on the basis of the fiction that one cannot know the decedent's intent unless it is apparent with the four corners of the estate planning documents . . . ." 261 Mich App at 651; 683 NW2d 210. The majority then adopted Plaintiffs' expert's view of how the estate documents *should* have been written, concluding that this view was more probable than any intent actually expressed in the documents: "It is far more likely that the decedents here intended to minimize the taxes payable upon their deaths than that they were indifferent to the amount of taxes payable, and it is virtually certain that they did not intend to pay more taxes than necessary." *Id.* at 651; 683 NW2d 210.

The Court of Appeals' decision to give more weight to an expert opinion about usual estate planning practices than to the actual language the decedents chose to use in the estate

documents stands the whole notion of "decedent intent" on its head. That is why six Justices of this Court in *Mieras* specifically rejected such an approach for discerning intent, holding that a court's reliance on the "usual" estate planning practices is improper and unnecessary:

> Although acknowledging that "Mieras and Ledbetter's claims depend on extrinsic evidence beyond the four corners of the will," the lead opinion goes on to state:
>
> > Although their evidence arguably does not contradict any provision of the will in the sense that the will makes no reference to the power of appointment under the marital trust, it is not unusual, in contrast with the omission of a residuary clause, for a will to fail to exercise a power of appointment.
>
> Thus, it appears that the lead opinion agrees with the rationale of the Florida Court of Appeals in *Arnold*. We conclude, however, that such speculation is neither proper nor necessary.

452 Mich at 307-308; 550 NW2d 202. If the rule were otherwise, these six Justices noted, "each separate paragraph of a will would have to be examined to determine whether it is common to include or exclude that provision from the will; the possibilities are endless." 452 Mich at 303; 550 NW2d 202.

The Court of Appeals majority below tried to distinguish *Mieras*, improperly characterizing Plaintiffs' claim as one that "does not involve . . . alternative estate planning approaches, but, rather, . . . that defendants were negligent in their tax planning advice, and failed to include provisions that are so standard in the type of trust here before the Court that the failure to include them demands an explanation." 261 Mich App at 648; 683 NW2d 210. But, as the Court of Appeals majority was forced to concede, "there may be valid reasons for the omission of a Crummey clause." *Id.* at 651; 683 NW2d 210. Among other things, "the decedents may not have wanted to confer a present right of withdrawal," and "it is costly and burdensome to send Crummey notices." *Id.* at 652; 683 NW2d 210. In addition, some clients choose not to

include Crummey clauses because of other gift plans in place that will use up the gift exclusion amount, and other clients simply do not want to engage in tax planning at all, because of the time and expense involved. All of these reasons demonstrate that an estate plan without a Crummey clause is an "alternative estate planning approach" that can be consistent with the intent of the decedents as expressed in the estate documents; *Mieras* is therefore indistinguishable.

The Court of Appeals majority also attempted to distinguish disputes "concerning the intended distribution of the pot of assets," from claims seeking "recovery for diminution in the pot . . . alleged to have been caused by the negligence of the defendants who provided estate planning." 261 Mich App at 653; 683 NW2d 210. But courts in other states have applied the "four corners" approach to the latter situation as well as the former.

For example, in *Kinney v Shinholser*, 663 So 2d 643 (Fla, 1995), a beneficiary of his parents' wills and trusts brought a professional negligence claim against the attorney who drafted his father's will. The will created a trust for the benefit of the mother during her lifetime, giving her a general power of appointment over the trust assets.[2] Because of the general power of appointment provision, $500,000 of the trust assets were subject to estate taxes that would have ordinarily been exempt. *Id.* at 645. Although the mother had the opportunity to disclaim the general power after the father's death, her accountant and a second attorney instead filed the father's estate tax return as though the general power of appointment did not exist. The IRS rejected the return, resulting in taxes, interest, and penalties totaling $320,000. *Id.*

The son alleged that his mother and father advised the drafting attorney that they wanted to minimize taxes, and he claimed that the provision in his father's will "that all my <u>just</u> debts, funeral expenses, taxes and costs of administration of my estate be paid" evidenced an

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[2] For an excellent opinion explaining a general power of appointment, *see In re Estate of Reisman*, __ Mich App __; __ NW2d __; 2005 WL 1224765 (May 24, 2005).

intent to minimize estate taxes. 663 So 2d at 645. The son further alleged that the drafting attorney "knew or should have known that the inclusion of the general power of appointment in the trust would frustrate that intent and cause an increase in such taxes." *Id.*

The Florida Court of Appeals began by discussing *Espinosa v Sparber*, 612 So 2d 1378, 1380 (Fla, 1993), in which the Florida Supreme Court reaffirmed that "standing in legal malpractice actions involving the drafting of a will is limited to those who can show that the testator's intent *as expressed in the will* is frustrated by the negligence of the testator's attorney." *Kinney*, 663 So 2d at 645. "Extrinsic evidence is not admissible to determine the testamentary intent because, as pointed out in *Espinosa*, to allow such evidence would dramatically increase the risk of misinterpreting the testator's intent, as well as heightening the tendency to manufacture false evidence which could not be rebutted due to the unavailability of the testator." *Id.* (emphasis added). Since the will was silent with respect to taxes, the court rejected the son's attempt to introduce extrinsic evidence and affirmed dismissal of the malpractice claim. *Id.*

Unlike the court in *Kinney*, the Court of Appeals majority below failed to recognize that a claim for "diminution of the pot" based on tax planning often cannot be distinguished from a claim that estate documents do not properly reflect a decedent's intent. This failure is perhaps best illustrated by the majority's pronouncement that "the interest of the deceased clients, the estate, and all the beneficiaries are aligned on the same side." 261 Mich App at 653; 683 NW2d 210. There is absolutely no language in the Friedman estate documents themselves that support this assertion. Quite the opposite, the Friedmans clearly expressed their intent that grandchildren are forbidden from receiving distributions before the age of 18, an intent that is plainly at odds with a Crummey clause that would have given beneficiaries a right of immediate withdrawal.

In sum, this Court's holding and reasoning in *Mieras* are fully applicable here. Accordingly, this Court should reverse the Court of Appeals' unorthodox approach to discerning a decedent's intent and reinstate the trial court's order of dismissal.

II. THIS COURT SHOULD REAFFIRM ITS COMMITMENT TO THE *MIERAS* "FOUR CORNERS" APPROACH TO INTERPRETING ESTATE DOCUMENTS.

This Court's "four corners" approach in *Mieras* is well reasoned and correct. This Court should reaffirm that holding, both generally and as applied to the facts of this dispute, for a number of reasons.

A. The Duty that Estate Planning Attorneys Owe to Non-Client Beneficiaries Should Not be Expanded.

"Absent unique circumstances, an attorney is only liable in negligence to his client." *Mieras*, 452 Mich at 297-298; 550 NW2d 202 (quoting *Atlanta Int'l Ins Co v Bell*, 438 Mich 512, 518; 475 NW2d 294 (1991), quoting 7 Am Jur 2d, Attorneys at Law, § 232, p 274). Allowing beneficiaries to sue for estate planning negligence at all is thus an extraordinary circumstance that runs counter to the general rule. For that reason, this Court "narrowly circumscribed" the duty an estate planner owes to beneficiaries in *Mieras*, *id.* at 302; 550 NW2d 202, holding that the duty "only requires the attorney to draft a will that properly effectuates the distribution scheme set forth by the testator in the will." *Id.; see also id.* at 301 n 4; 550 NW2d 202, quoting *Ginther v Zimmerman*, 195 Mich App 647, 655; 491 NW2d 282 (1992) ("We believe that where the intent of the testator as expressed in the testamentary instrument is not frustrated, an attorney owes no duty that will give rise to a cause of action to persons not named in the instrument"); *accord Karam v Law Offices of Ralph J Kliber*, 253 Mich App 410, 424; 655 NW2d 614 (2002) ("Where the decedent's intent is clearly expressed and the documents

effectuate that intent, the beneficiaries are constrained to live with the result and the drafting attorney is not liable.").

Plaintiffs ask this Court to further expand an estate planner's duty to require that the planner always maximize the estate available to the beneficiaries. Such an expanded duty may not always be consistent with the testator's or donor's intent, such as where a donor does not want beneficiaries to have even a limited immediate withdrawal right, where a donor has other gift plans in place that will consume the gift exclusion amount, or where a donor simply does not want to spend time and money on tax planning issues at all.

In addition, the expanded duty for which Plaintiffs advocate further departs from the general rule that an attorney is generally liable in negligence only to his client, and it improperly elevates beneficiaries to client-like status. An expanded duty would force estate planners to balance the interests of their client testators and donors against the interests of those clients' beneficiaries, an impossible position that could circumscribe severely an attorney's ability to advance the best interests of a client.

Given these delicate and potentially competing policy concerns, it is the Legislature, not the courts, that should be considering any potential expansion of estate planner duties to non-client beneficiaries. *See, e.g., Sizemore v Smock*, 430 Mich 283; 422 NW2d 666 (1988) ("It is clear to us that further extension of a negligent tortfeasor's liability involves a variety of complex social policy considerations. In light of these concerns, we believe that the determination of whether this state should further extend a negligent tortfeasor's liability for . . . damages should be deferred to legislative action rather than being resolved by judicial fiat."). This Court should reject the Court of Appeals' unwarranted expansion of an estate planner's duties to non-clients.

B. The Proper Focus When Evaluating an Estate Planning Negligence Claim is the Decedent's Intent, Not What is "Usual" In Estate Planning Practices.

"If extrinsic evidence is admitted to explain testamentary intent, . . . the risk of misinterpreting the testator's intent increases dramatically." *Espinosa v Sparber*, 612 So 2d at 1380. This is particularly true where a beneficiary advances an expert opinion regarding "usual" estate planning practices, thus changing the focus from a decedent's intent to a beneficiary's best interest. *Cf. Henkell v Winn*, 550 SE2d 577, 579 (SC, 2001) ("But how is the [testator's] intention to be ascertained? Certainly not by conjecture as to what the testator *ought* to have done, but by considering what is the plain meaning of the language which he has used . . .") (emphasis added).

Take the specific example of a Crummey clause. An attorney may advise a client to include such a clause, and the client may reject that advice, among other reasons, to eliminate the possibility that the beneficiary will exercise the unqualified right to withdraw, or to preserve the validity of other gift plans that may consume the gift exclusion amount. If a sufficient amount of time has passed, such that the attorney simply cannot remember the Crummey dialogue with a client, it is entirely possible that the decedent's actual intent will be thwarted by submission of an expert affidavit that Crummey clauses are "usually" included, and a beneficiary's testimony that the decedent disliked paying taxes. Such an absurd result can be avoided only by a continuing commitment to the "four corners" approach.

Moreover, as previously mentioned, not every client wants to engage in tax planning. Some clients find the process too complicated, others too expensive. Yet the Court of Appeals, in relying on the Lansky Affidavit, has elevated the minimization of taxes above almost any other estate planning interest. This is judicial overreaching that only serves to highlight the

mischief that can be wrought when a court's attention deviates from the decedent's intent as expressed in the estate documents.

C. The Lack of a Limitations Period for Estate Planner Negligence Claims Counsels Against the Use of Extrinsic Evidence to Prove a Decedent's Intent.

Estate planners, unlike architects or other professionals, lack any statute of repose, and a broader protection against claims of negligence is justified where there is no limitations period to protect the planner. Here, the Morris and Sarah Friedman Irrevocable Trust was executed in 1988, some 17 years ago. If this matter is returned to the trial court for a deposition and examination of the file, will the lawyer's file or recollection be complete after so many years? What if the drafting attorney has retired and any notes of client conversations have been destroyed? Moreover, where such substantial time has passed, a potential opportunity to correct an asserted error may have been lost by the client him or herself.

In addition, the best witness for proving a decedent's intent is the decedent, who by definition is unavailable for discovery and testimony. Questions of fundamental fairness therefore arise in subjecting estate planners to malpractice claims in such circumstances. Again, these issues counsel strongly in favor of the "four corners" approach.

D. The Law Does Not Require an Estate Planner to Force a Client to Comply with Alleged Best Planning Practices.

Plaintiffs' claim suggests that an estate planner does not satisfy his or her duty of care simply by giving advice at the time the estate documents are executed. Rather, the planner must make regular efforts to persuade the testator or donor to do what the *planner* thinks is best in the circumstances. (*See, e.g.,* First Am Compl ¶ 10(a), (b) (claiming it was Defendants' duty to "strongly insist," on a yearly basis, that the decedents take advantage of a Crummey clause).) To begin, this is not and has never been the law in Michigan. *See, e.g., Persinger v Holst*, 248

Mich App 499, 508; 639 NW2d 594 (2001) (estate planning attorney "did not have a legal duty" to prevent the testatrix from designating an agent of her choice, even if the choice was a particularly bad one). And the argument assumes that tax savings are always part of best planning practices, when experience shows that (1) not every client wishes to pursue a tax minimizing objective, and (2) best practices may result in estate documents that intentionally omit a tax savings provision like a Crummey clause because of other gift plans that exist outside the "four corners" of a will or trust.

E. The "Four Corners" Approach to Interpreting Estate Documents Is Consistent with this Court's Plain Language Approach to Interpreting Contracts.

Finally, the *Mieras* "four corners" approach is consistent with this Court's approach to discerning party intent when analyzing written contracts. It is well settled that the "rights and duties of parties to a contract are derived from the terms of the agreement." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 62; 664 NW2d 776 (2003) (citation omitted). Where the words the parties used are "clear and unambiguous and have a definite meaning," extrinsic evidence is impermissible, *Sheldon-Seatz, Inc v Coles*, 319 Mich 401, 407-407; 29 NW2d 832 (1947), and it is inappropriate to alter the plainly expressed intent even by considering a party's "reasonable expectations," *Wilkie*, 469 Mich at 62-63; 664 NW2d 776, much less the expectations of non-parties.

As mentioned above, a court's sole duty when interpreting estate documents is likewise to give effect to the plain language of the testator or donor. *Butterfield*, 405 Mich at 711; 275 NW2d 262. And there is no reason why beneficiaries seeking to undo the plain language of estate documents should be allowed to use extrinsic evidence or expert testimony to impose their own expectations when parties seeking to undo the plain language of a contract cannot. If anything, the extra protections generally required when executing estate documents,

such as witnesses and notarization, *see, e.g.,* MCL 700.2502; MCL 700.2504, suggest that the "four corners" of an estate document should be even more inviolable than the "four corners" of a private contract. To promote consistency between these areas of the law, then, this Court should reaffirm the *Mieras* "four corners" rule in all contexts, permitting the introduction of extrinsic evidence only where the estate documents themselves contain an inconsistency or ambiguity. This Court should also unequivocally reject a party's ability to proffer an expert opinion regarding "usual" estate planning practices as a proxy for the testator's or donor's stated intent.

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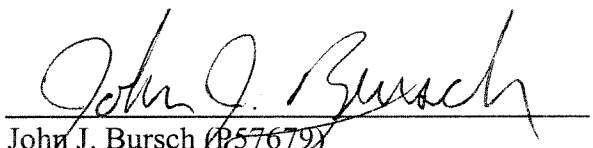
CONCLUSION

The Court of Appeals majority below erred when it looked to an expert's opinion regarding "usual" estate planning practices to determine the decedents' intent, rather than analyzing the plain language of the decedents' estate documents. This Court should reaffirm its holding in *Mieras* that, in the absence of an ambiguity or inconsistency, only the "four corners" of an estate document may be considered to ascertain a testator's or donor's intent, and that it is always improper to look to an expert's opinion regarding "usual" estate planning practices as a proxy for that intent. Accordingly, the Court of Appeals decision should be reversed.

Respectfully submitted,

Date: July 6, 2005

WARNER NORCROSS & JUDD LLP

By 

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